

IN THE
United States
Circuit Court of Appeals

For the Ninth Circuit.

E. L. COBB, as Trustee of the CRAIG LUM-
BER CO., Bankrupt, and THE BANK OF
ALASKA,

Appellants,

vs.

HILLS-CORBET COMPANY, a Corporation,
Composed of F. R. HILLS and W. W.
CORBET,

Appellees.

PETITION FOR REHEARING.

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J. H. COBB,
Counsel for the Appellants.

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No. 3552.

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Petition for Rehearing.

To the Honorable the Judges of the United States
Circuit Court of Appeals, for the Ninth Circuit:

We have examined with care the opinion of this Court handed down the 3d day of January, 1921, and it appears that the Court has overlooked two points raised in the assignments of error and discussed in the briefs. If the Court did in fact overlook these, it was no doubt due to the inadequate brief filed in behalf of the appellants. We feel con-

strained, therefore, to petition the Court for rehearing and a reconsideration of the following two points:

1. Whether or not under the statutes of Alaska a conditional sale not executed and recorded as required by said statutes can be enforced against a trustee in bankruptcy.

2. Whether or not under the terms of the conditional sale the board of the employees of the Hills-Corbet Co. was a part of the cost of labor to be paid by them.

If the first point should be decided in favor of the appellants it is conclusion of the whole case. If the second point is sustained it materially reduces the amount of the judgment.

The statutes of Alaska bearing upon and which we conceive control the matter, read as follows:

“Sec. 740. A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith for value, unless—

(1) The possession of such property be delivered to and retained by the mortgagee; or

(2) The mortgage provides that the property may remain in the possession of the mortgagor and be accompanied by an affidavit of all the parties thereto, or, in case any party is absent from the precinct where such mortgage is executed, at the time of the execution thereof, an affidavit of those present and of the agent or attorney in fact of such absent party that the same is made in good faith to secure the amount named

therein, and without any design to hinder, delay, or defraud creditors, and be acknowledged and filed as hereinafter provided.”

“Sec. 743. Every mortgage of personal property, together with the affidavits of the parties thereto or a copy thereof, certified to be correct by the person before whom the acknowledgment has been made, must be filed in the office of the recorder of the precinct where the mortgagor resides, and of the precinct where the property is at the time of the execution of the mortgage, or, in case he is not a resident of the district, then in the office of the recorder of the precinct where the property is at the time of the execution of the mortgage; and the recorder must, on receipt of such mortgage or copy, indorse thereon the time of receiving the same, and file and keep the same in his office ruled and kept for that purpose, the names of all the parties—the names of the mortgagors to be alphabetically arranged—the consideration thereof, the date of its maturity, and the time of filing the same.”

“Sec. 744. Every mortgage filed as provided in this chapter shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the term of one year a true copy of such mortgage, with a verified statement exhibiting the interest of the mortgagee in the property at the time the same is renewed, as

claimed by virtue of such mortgage, is again filed in the office where the original was filed; and the effect of such renewal shall be to extend the lien of the mortgage as against the creditors, purchasers, and incumbrancers of the property for the further term of one year.”

“Sec. 748. The provisions of the foregoing sections of this chapter shall extend to all such bills of sale, deeds of trust, and other conveyances of goods, chattels, or personal property as shall have the effect of a mortgage or lien upon such property.”

Compiled Laws of Alaska.

The conditional sale contract in this case (Record, 5-9) was not executed as required by said statutes nor recorded. As a chattel mortgage it was clearly void both as against the trustee in bankruptcy and the bank. Does section 748, *supra*, require that conditional sales to be valid in Alaska shall be executed in like manner? We think it does. The requirements of sections 740, 743 and 744 are by section 748 extended “to all such bills of sale, deeds of trust and other conveyances of goods, chattels or personal property as shall have the effect of a mortgage or lien upon such property.” By the decision of the lower court and this court, the application of payments was made first as to the extras furnished by the Hills-Corbet Co., on the ground that it was not inequitable “to extinguish first those debts of which the security is most precarious.” In short, in the conditional sale involved in this case, the Craig Lumber Company was in effect a mortgagor in possession, and the Court

will observe that the statute strikes down such instruments when not executed and recorded in accordance with the law against creditors with or without notice. They are only saved as to subsequent purchasers or mortgagors with notice.

The other point not decided by the Court relates to the action of the lower court in charging the Craig Lumber Co. with the sum of \$3,324.00, the cost of boarding the employees of the Hills-Corbet Co., while they were working under the contract. Under the terms of the contract the entire cost of the labor, except the transportation from Seattle, Washington, to Craig, Alaska, was to be borne in the first instance by the Hills-Corbet Co. (Record, pp. 7, 8), and that cost added to all other costs in fulfilling the contract was not to exceed \$32,125.00. Now, it is beyond question from the record that this sum of \$3,324.00 board of the Hills-Corbet Co. employees was paid directly by the Craig Lumber Company and the amount due the Hills-Corbet Co. should be reduced by that amount unless the Court was right in permitting W. W. Corbet to testify that in a conversation with the president of the Craig Lumber Co., the terms of this written contract were varied by the assumption of the Craig Lumber Company to stand for the board of the men. Even if that could be done in any case, it was error to allow it here because no such variation of the contract was plead. The appellees relied in their petition upon the written contract under which, as recognized by them, they were liable for the board of the men. Without any pleading to put appellants upon notice of any such purpose they were permitted at the trial to testify to

another and different contract, and without any opportunity for appellants to contradict said testimony by F. J. Tromble if they could.

Respectfully submitted,

J. H. COBB,

Counsel for the Appellants.

I hereby certify that I am one of the counsel for appellants and that in my opinion the above and foregoing Petition for Rehearing is well founded in point of law and fact and is not interposed for delay.

J. H. COBB,

Counsel for Petitioners and Appellants.